BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the trial court appears at 52 U. S. P. Q. 364 and at Rec. p. 152. The opinion of the Circuit Court of Appeals appears at 55 U. S. P. Q. 310 and at Rec. p. 235. December 18, 1942 (date of denial of petition for rehearing) is the significant date of the decree to be reviewed.

Jurisdiction.

See petition (page 3, *ante*).

Matter Involved.

The matters for determination by this court are

(1) Shall patents be held invalid because their patentees have dealt with no new principles of physics?

(2) Was the Circuit Court of Appeals, influenced as it was by its finding that the patentee Bellow dealt with no new principles of physics, justified in holding the Bellow patent invalid?

Your petitioners admit (and never have denied) the fact to be that the patentee Bellow dealt with no new principles of physics.

Federal Statute Involved.

R. S. 4886. (U. S. C., Title 35, Sec. 31.) Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented

or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

Specification of Errors Intended To Be Urged.

The errors which petitioners will urge, if the petition for writ of certiorari is granted, are these:

(1) That the Circuit Court of Appeals erred in attaching significance to the fact that the patentee Bellow was not working with new principles of physics. (Such fact being immaterial in view of R. S. 4886.)

(2) That the Circuit Court of Appeals, in arriving at its conclusion that the Bellow patent is invalid, erred in relying upon the fact that the patentee dealt with no new principles of physics.

(3) That the Circuit Court of Appeals erred in failing to hold the Bellow patent valid for the reason, *inter alia*, that the patentee so combined three elements as to meet a long felt public need with a simple problem solving gadget in which one of the elements bears an entirely new performance improving relationship to each of the other two elements.

ARGUMENT.

The Matter Presented Is Serious and of Great Public Importance.

The instant case is believed to be the very first, in the history of American patent law administration, in which the fact that a patentee dealt with no new principles of physics has been judicially set forth as a reason for holding his patent invalid.

Very few patentees have dealt with new principles of physics in evolving their contributions to human progress. The vast majority of inventors deal only with those principles of physics which are old and well known. These are truisms. New principles of physics are only very rarely discovered.

Consequently, most United States patents now in existence, no matter how meritorious the inventions they purport to cover, are invalid if patents properly are to be held invalid, as the opinion of the court below indicates, because their patentees have dealt with no new principles of physics.

It is estimated by your petitioners (and the estimate is believed to be quite conservative) that no less than three-fourths of the United States patents now in existence cover improvements which were evolved without anyone dealing with new principles of physics.

The Patent Invalidating Defense Recognized by the Circuit Court of Appeals Is Repugnant to R. S. 4886 (U. S. C. Title 35, Sec. 31).

R. S. 4886 is set forth at page 5, *ante*. It is that fundamental section of our patent law which specifies what persons may obtain United States patents. It contains absolutely nothing supporting the proposition that only persons who have dealt with new principles of physics may obtain patents; and it is plainly repugnant to such proposition because providing that

> "*Any person* who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, * * * may * * * obtain a patent therefor."

Surely the patent statutes do not justify the court below in having accorded probative force or significance, on the question of validity, to the circumstance that the patentee Bellow dealt with no new principles of physics. It cannot be doubted that the court below did attach much probative force or significance to such circumstance; because the record shows that the inclusion in that court's opinion of the statement that

> "Bellow dealt with no new principles of physics"

was, in effect, its ruling in respect to your petitioners' afore-mentioned fifth assignment of error reading as follows:

> "5. The court erred in attaching significance to the fact that the patentee Bellow was not 'working with new principles of physics.' " (Assignment of Errors—Rec. p. 163.)

Conclusion.

The American patent system has become an old one. Over two and one-quarter million patents have been granted. Nearly three-quarters of a million of these have not expired. Thousands of patent suits have been decided. Patents have been assailed upon almost every conceivable ground. It is reasonable to assume that the courts of the United States have considered every defense which reasonably can be asserted against the validity of a patent granted under our patent statutes. When what purports to be a new defense questions the validity of a patent granted under those statutes, it should be viewed with suspicion until its soundness has been demonstrated beyond doubt. When it appears that one of the Circuit Courts of Appeals has accepted such a defense without considering its repugnancy to or harmony with the patent statutes, its action is presumably in error, and should, without doubt, be reviewed by Your Honors. This is especially true in the instant case, because the action of the Circuit Court of Appeals not only vitiates your petitioners' patent; it actually challenges the validity of thousands of other patents as well.

The welfare of our patent system requires that the writ prayed for be issued.

Respectfully submitted,

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